IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. MONICA TOTH, Defendant.	)	Case No. 1:15-cv-13367 Judge Burroughs

Plaintiff United States' Opposition To Motion To Dismiss

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I. Introduction.

Ms. Toth raises four issues in her motion to dismiss: insufficient and defective service of process (Rule 12(b)(4) and (5)); lack of personal jurisdiction (Rule 12(b)(2)); failure to state a claim on which relief can be granted (Rule 12(b)(6)); and that the 8th Amendment's protections against "excessive fines" preclude entry of judgment. ECF 50 at 3-4. The first three claims are wholly without merit and addressed in this memorandum. The 8th Amendment claim – to which Ms. Toth devotes but three sentences, see ECF 50 at 3-4 –deserves more careful consideration, however. As set forth in greater length in the accompanying motion, the United States requests an extension until December 15 to fully respond to this one argument.

Ms. Toth's seven-page memorandum of law is notable for the smorgasbord of claims raised without a single citation to any case or precedent. Most of the claims are not even explained in that memorandum (nor in the corresponding motion) and ought to be denied on this basis alone. Her decision to present arguments in this manner makes it challenging to fully respond because it is difficult to understand the scope of her arguments. In her motion, she requests "leave of court to amend this motion with an analysis of case law in any areas where the Court might disagree…". ECF 49 at 1. The United States objects to any revisions to her memorandum or motion and the inclusion of any additional authorities that could have been supplied in the opening brief but were not. This is especially so because Ms. Toth had ample opportunity to prepare these papers to her liking; the Court granted defendant's extension of time to permit her two months to respond (August 17-October 12). ECF 43 and 47.

For the reasons set forth below, defendant's motion to dismiss under Rule 12 should be denied.

II. Background.

a. Facts regarding efforts to serve Ms. Toth with process.

Admissible evidence shows that Ms. Toth intentionally evaded service of process, but that service was ultimately effected on January 11, 2016 – within 120 days of when the complaint was filed, on September 16, 2015.

The undersigned engaged Ian Daley, a professional process server. He signed a declaration regarding his efforts to serve Ms. Toth. (The Daley Declaration has been previously filed on the docket at ECF #4 and is thus not re-attached to this filing.) Mr. Daley explained that he "made a significant number of trips to 76 Hallet Hill Road, Weston, Massachusetts…. on different days of the week, different times of the day, … [including] multiple trips to that address each day." Declaration of Ian Daley at ¶2 (Hereinafter referenced as Daley Declaration at ___).

At 76 Hallet Hill Road, Weston, Process Server Daley routinely encountered a man whom he described as "white male, approximately 6' 1" tall, mustache, with black hair." Daley Declaration at ¶3. Once, Process Server Daley saw the man inside the residence, but he refused to open the door and instead stared at Process Server Daley through the window. *Id*. at ¶3. On this occasion, Process Server Daley explained that "when I announced my name and my intention to serve Monica Toth with legal process, he refused to open or answer the door." Process Server Daley also stated that on other occasions when he went to serve process at that address, the same man opened the door to the address and spoke to Daley. *Id*. at ¶4. Process Server Daley asked for the man's name and whether he lived there, but the man refused to answer those questions. *Id*. at ¶4. But Process Server Daley asked the man about other related matters concerning efforts to serve Ms. Toth. The man stated to Process Server Daley that:

> …he knew Monica Toth, (b) that Monica Toth lived at that residence, (c) that Monica Toth was not

> available at the present time but that she would return in the future, (d) *that he had spoken with Monica Toth regarding [Process Server Daley's] efforts to serve her with legal process, (e) that he did not want to accept any documents on her behalf, ([f]) that she did not want to accept any documents from [Process Server Daley]*, and ([g]) that she preferred that [Process Server Daley] send her a letter by first class mail. *Id*. at ¶4 (italics added).

Although Process Server Daley asked the man during those same conversations when Ms. Toth would return, the man refused to answer. *Id*. at ¶4. Process Server Daley gave the man Daley's business card and "asked that he or Monica Toth call [Process Server Daley] to arrange for service of legal process on her." *Id*. at ¶4. But Process Server Daley never received any call from the man or from Ms. Toth. *Id*. at ¶9. Ms. Toth admits in her papers at ECF 29-1 at paragraph 21 that she knew about and had received the business card left by the service processor at her home (but she does not state when she learned of or received the card). ECF 29-1 at ¶21.

Process Server Daley reported seeing in the driveway at 76 Hallet Road, Weston, a vehicle that he believed belonged either to Ms. Toth or to the man who appeared to live there. Daley Declaration at 5. He reached this conclusion because "The movement of the vehicle (being there on some days but absent on other days, and moved around within the driveway) indicated to me that at least one person was living in that house." *Id*. Process Server Daley describes the vehicle as "a Toyota Tacoma, license plate Massachusetts 8920RZ." *Id*. Subsequently, undersigned counsel assigned a paralegal at the Department of Justice to research the ownership/registration of that vehicle. As set forth in greater length in the declaration of Paralegal Sheryl Williams, a search of the LexisNexis database shows that Ms. Toth's current address, driver's license, and vehicle ownership were located. Williams Declaration at ¶¶2-3. (The Williams Declaration has been previously filed on the docket at ECF 42-1 and is thus not re-attached to this filing.) Paralegal

Williams examined these records and ascertained that the Toyota Tacoma truck with Massachusetts License Plate 8920RZ was registered to Ms. Toth. Williams Declaration at ¶4. This means that the vehicle that Process Server Daley saw in the driveway was owned by and registered to Ms. Toth.

After Process Server Daley had made a number of unsuccessful efforts to serve Ms. Toth personally with process, undersigned counsel instructed Process Server Daley to follow Massachusetts Rules of Civil Procedure and serve Monica Toth "by leaving copies [of a summons and complaint] thereof at his last and usual place of abode." MRCP 4(d)(1). Process Server Daley stated that he went on the evening of January 11, 2016, and taped the documents to the front door at 76 Hallet Hill Road, Weston, Massachusetts. Daley Declaration at ¶8. Undersigned counsel caused a copy of those documents to be sent by certified mail as well. (The De Mello Declaration has been previously filed on the docket at ECF 42-2 and is thus not re-attached to this filing.) De Mello Declaration 8/12/16, ¶2.

b. Sequence of events regarding Ms. Toth's appearance.

Ms. Toth did not timely file any responsive papers. On February 5, 2016, undersigned counsel filed a motion for default of Ms. Toth. ECF 5. On February 9, 2016, the Court entered Ms. Toth's default. ECF 6. Shortly thereafter on February 22, 2016, undersigned counsel filed a motion for entry of default judgment. ECF 8. The Court set a hearing on the default judgment motion for March 17, 2016. ECF 9. Undersigned counsel moved to reschedule the hearing due to a conflict, and the hearing was rescheduled for March 31, 2016. ECF 10, 12.

At ECF 13, Ms. Toth filed a motion for extension of time in order to "*respond* to a Motion for Entry of Default Judgment filed by the plaintiff." ECF #13, italics added. In the declaration she attached in support at paragraph 20-21, she writes:

> On December 31 at about 11:15, I had already been awake… I was inside my home in a room not too far away from the front door to hear everything clearly, yet from my vantage point, I could not see in front of the house.
>
> …[S]uddenly, I heard repeated ringing of the doorbell and violent pounding on the door. It was very frightening, and I froze as the pounding and ringing continued. I had no intention to risk my life in case this crazy person would harm me.
>
> […]
>
> The noise stopped, and there was silence. I thought it might be over… but then, the ringing and pounding resumed just as it had earlier…
>
> Absolutely nothing was left behind and I could only imagine who it was, what they wanted, or why they did what they did. I thought of calling the police, and had the person not left and disappeared without a trace, I would have called the police to report this bizarre incident." *Id*. at ¶20-24.

She notes later in her declaration (¶30) that she subsequently "realized that the incident on December 31 must have been . . . an attempt [to serve me with legal process]." ECF 13-1 at ¶30. Ms. Toth went on to explain that the only item she received in the mail was the notice of default that was read to her over the phone on February 18, 2016, by someone she asked to collect her mail. ECF 13-1 at ¶25. She also claims to have belatedly received mail on an unknown date, but implied it was sometime after March 12, 2016. *Id*. at 29. She does not explain why she did not receive all of the other certified mail that was sent to her by undersigned counsel and by the Court prior to that date. *See* De Mello Declaration 8/12/16, ¶2.

c. Ms. Toth participated in the hearing on April 29, 2016, at 10:30am.[1]

At the hearing, Ms. Toth admitted that she had a copy of the complaint. P17, L16.

1 The notation in ECF 23 misstates the date the hearing was held. It was held on April 29, 2016.

III. Legal Authorities & Analysis

a. Insufficient Service of Process and Defective Process, Rules 12(b)(4) and (5)

Rule 4(c)(l) requires that a summons be served with a copy of the complaint, and also makes the plaintiff responsible for having the summons and Complaint served within the time allowed by Rule 4(m). Fed. R. Civ. P. 4(c)(l). Ms. Toth first argues that, because she was not served within 90 days of the filing of the complaint, the action should be dismissed. Rule 4(m), as it existed on the date the complaint was filed (September 16, 2015), required that service be made within 120 days of filing the complaint. This Rule was amended to reduce the time for service to 90 days, with an effective date of December 1, 2015. The Rule was intended to *"govern in all proceedings in civil cases thereafter commenced*, and insofar as just and practicable, all proceedings then pending." See Orders of the Supreme Court of the United States Adopting and Amending Rules, Order of April 29, 2015, Paragraph 2. As this case was commenced in September 2015, the United States respectfully submits that it is neither *just* nor *practicable* to apply the amended rule retroactively to dismiss this action, when the United States was making diligent efforts to serve the defendant. The statute of limitations to file suit lapsed shortly after the complaint was filed. Thus, any dismissal would have the effect of being made *with prejudice* and would forever bar the United States from reaching the merits of the complaint's allegations.

Ms. Toth also argues that the summons that was served on her was defective for the same reasons she raised in an earlier brief (and incorporated it by reference, and because of that defect, service should be deemed never to have occurred, and thus, the case should be dismissed. Her objection is that the summons served on her lacked her name under the section captioned "To (Defendant's Name and Address)" and lacked undersigned counsel's name and address under the section captioned "The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:". These two errors are harmless because the rest of the documents served on her provide Ms. Toth with more than adequate notice of the suit.

Rule 4(a)(1)provides that a summons must contain:

> (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal.

Fed. R. Civ. P. 4(a)(1). Rule 4(a)(2) provides that "the court may permit a summons to be amended." Fed. R. Civ. P. 4(a)(2). The summons was filed by the Clerk at ECF 3. Here, the caption of the summons bears her name and shows the plaintiff is the United States. Second, the summons bears the case number, and shows the court that issued the summons. She could have inquired from the Court if further information were legitimately needed. Third, this case has only one plaintiff and one defendant. The case is obviously filed against her, and glancing at it shows she has an obligation to respond. Toth already admitted she received the complaint, and the complaint has the same information—including a signature block showing undersigned counsel's address and contact information. The complaint explains in each paragraph the basis for the United States' claims against her. Fourth, Toth could have simply served the Clerk of the Court with her response and it would have been docketed. The purpose of providing the attorney's name on the summons is because a litigant is required both to file a response with the Clerk of the Court and also serve a copy on the plaintiff's attorney. Fifth, Ms. Toth could have looked at the return address label on envelopes mailed to her by certified mail (bearing undersigned counsel's office address), including the one sent containing another copy of the complaint and summons. Instead Ms. Toth refused to accept certified mail and these envelopes were returned to sender. Sixth, Ms. Toth admittedly began to appear in this Court after receiving a copy of the notice of default (ECF 7), on which undersigned counsel's name and address do not appear. Ultimately, Ms. Toth did not take any reasonable measures to timely respond—instead she pretended as if she had never received any documents. She should not be rewarded for effectively closing her eyes and willfully blinding herself to what transpired.

Ms. Toth also insinuates a motive in the manner by which the United States caused service of a summons that has two minor omissions. In reality, these oversights appear to be the result of a series of innocuous errors by both undersigned counsel and the Clerk's Office. When the case was commenced the undersigned uploaded onto the ECF system a summons that inadvertently omitted Ms. Toth's name and the undersigned's address and name. *See* De Mello Declaration 8/12/16, ¶4. Within a day or two, the undersigned became aware of the error (due to the passage of time it is not clear how) and contacted the clerk's office with a new, corrected summons. De Mello Declaration 8/12/16, ¶5. The clerk's notation on the docket shows that "Attachment 2 replaced on 9/17/2015," indicating that the summons was replaced the day after the case was filed. The replaced document, ECF 1-2, attached to the complaint, is totally correct in all respects. But the Clerk's office appears to have issued the original, incorrect, version as ECF 3, rather than relying upon the corrected version. Without noticing the omissions, the undersigned counsel transmitted the summons to the service processor, who also appears to have overlooked these omissions. De Mello Declaration 8/12/16, ¶6.

Moreover, the immaterial omissions do not matter because Ms. Toth had actual knowledge of the lawsuit. Ms. Toth evaded service of process, had actual knowledge of efforts to serve her (and of the lawsuit), and thus engaged in a strategic default. Ms. Toth knew that efforts were being made to serve her and she simply did not wish to accept service of process.

Applying these facts to established law shows that dismissal is inappropriate. In another case in this district, a defendant moved to dismiss because the summons lacked similar information: "the summons served on Intuition does not state the name and address of Upromise's attorneys." *Upromise, Inc. v. Angus*, No. CIV.A. 13-CV-12363, 2014 WL 212598, at *13 (D. Mass. Jan. 21, 2014). The court denied the motion because there was "no prejudicial harm that has occurred to Intuition as a result of the Plaintiffs' failure to include their attorneys' information in the summons", and ruled that amending the summons as provided by Rule 4(a)(2) was the more appropriate course of action. *Id.*

The Fourth Circuit Court of Appeals held in *Karlsson v. Rabinowitz,* 318 F.2d 666, 669 (4th Cir.1963), "where actual notice of the commencement of the action and the duty to defend has been received ... the provisions of [former] Rule 4(d)(1) should be liberally construed to effectuate service and uphold the jurisdiction of the court ....". The court thus overturned the District Court's dismissal under Rule 4 for invalid service, even when the service at issue was made on defendant's spouse at a dwelling that was no longer defendant's residence, to which defendant never intended to return, because defendant's spouse told him about the suit and service. This suggests that the core principle of service is actual notice. In dicta, another Fourth Circuit panel found that "when the process gives the defendant actual notice of the pendency of the action, the rules, in general, are entitled to a liberal construction. When there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process." *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984). The Ninth Circuit found that "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union, Locals*

197, 373, 428, 588, 775, 839, 870, 1119, 1179, and 1532 v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984).

The purpose of filing a complaint and serving a summons is to provide a defendant with notice of the case. Here, the service processor signed a declaration that many efforts were made to serve Ms. Toth, that she was evading service, and previous portions of this brief outline the myriad ways that Ms. Toth knew about the case and did nothing. Although there must be substantial compliance with the rules of service of process, they are to be liberally construed when a defendant has sufficient notice of the complaint. *Concepcion v. VEB Backereimaschenbau Halle*, 120 F.R.D. 482 (D.N.J. 1988). "Service of process serves a dual purpose: it gives the court jurisdiction over the person of the defendant as well as notifying him of the lawsuit." *Worthington v. Aramark Food Co.*, 2007 WL 1435544 (N.D. Ind. 2007). "The purpose for service of process is to notify the defendant of the cause of action so that the defendant will have full and adequate opportunity to defend against the same." *Worthington v. Commodity Credit Corp.*, 157 F. Supp. 497, 500 (E.D.N.C. 1957), judgment rev'd on other grounds, 263 F.2d 178 (4th Cir. 1959). Here, service was made, even after Ms. Toth evaded service. Ms. Toth admitted she received the papers. Hearing Transcript, P17, L16. She had actual knowledge of the suit at the time service was being made, as shown throughout this brief. On this basis dismissal is plainly inappropriate. The United States does not object to amending its summons and issuing it to Ms. Toth, provided that service can be made by certified mail to conserve resources rather than hire a process server to again chase Ms. Toth.

b. Lack of Personal Jurisdiction, Rule 12(b)(2)

"When a district court considers a motion to dismiss for lack of personal jurisdiction without first holding an evidentiary hearing, the *prima facie* standard governs its determination."

Hilsinger Co. v. FBW Investments, 109 F. Supp. 3d 409, 416 (D. Mass. 2015) citing *United States v. Swiss Am. Bank,* 274 F.3d 610, 618 (1st Cir. 2001). "When a court's personal jurisdiction over a defendant is contested, the plaintiff has the ultimate burden of showing by a preponderance of the evidence that jurisdiction exists." *Adams v. Adams,* 601 F.3d 1, 4 (1st Cir. 2010). In such a setting, the allegations in the complaint are taken as true and construed in best light to favor the non-movant. "Due process requires that a defendant over whom a Massachusetts court will exercise jurisdiction has maintained minimum contacts with the state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Hilsinger Co. v. FBW Investments*, 109 F. Supp. 3d 409, 420–21 (D. Mass. 2015) quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Ms. Toth argues that the "plaintiff failed to reasonably notify me (Rule 12)(b)(2))." ECF 49 at 1. In her brief, paragraph 21 appears to be the only place corresponding with reasonable notice. ECF 50. It is not clear what that paragraph actually argues beyond the need to provide "reasonable notice." It is not clear how this bears upon Rule 12(b)(2) or personal jurisdiction. By any reasonable standard the Court has personal jurisdiction over her. "Defendant Monica Toth resides within the jurisdiction of the court." Complaint at 1. In adjudicating this motion to dismiss, the Court is required by the preceding authorities to treat this allegation as true, as Toth submitted no evidence controverting this fact. Additionally, the address at which she was found was in Massachusetts, the home she owns (76 Hallet Hill Road, Weston, Massachusetts) is in Massachusetts, and the car she drives is registered to a Massachusetts address. These facts existed as of the filing of the complaint. The Court sits in Massachusetts. If Ms. Toth does not reside within the jurisdiction of the Court, the United States has no objection to transferring this action to the district in which she lives. Ms. Toth's arguments regarding a lack of personal jurisdiction are patently frivolous and her request to dismiss on this basis should be denied.

c. Claim on which Relief Cannot be Granted, Rule 12(b)(6)

A party may by motion may seek to have a complaint dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face. *Iantosca v. Benistar Admin Services, Inc.*, 738 F. Supp. 2d 212, 217 (D. Mass. 2010)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In determining whether a party has sufficiently stated a claim upon which relief can be granted, "the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *Iantosca v. Benistar Admin Services, Inc.*, 738 F. Supp. 2d 212, 217 (D. Mass. 2010) (citing *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000)). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Gorski v. New Hampshire Dept. of Corrections*, 290 F.3d 466, 473 (1st Cir. 2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). If a party submits materials outside the pleadings in its motion to dismiss and those materials are accepted by the Court, the motion to dismiss is converted into a motion for summary judgment. See Fed. R. Civ. P. 12(d). "Rule 12(b)(6) does not provide an avenue for defendants to challenge the underlying merits of a case." *Freeport Transit, Inc., v. McNulty*, 239 F. Supp. 2d 102, 108 (D. Me. 2003). "Factual challenges are not permitted under Rule 12(b)(6) . . . ." *Carswell v. Air Line Pilots Ass'n Intern.*, 540 F. Supp. 2d 107, 114 (D.D.C. 2008); see *Kelly v. Fed. Emergency Mgmt. Agency*, 549 F. Supp. 8, 14 (D. Mass. 1981) ("Because it requests the court to make fact determinations that are not proper in ruling on a motion to dismiss, [the party's] motion to dismiss will be denied."). In its analysis, "[t]he Court's focus is . . . restricted to the facts as alleged by the plaintiff . . . ." *Carswell*, 540 F. Supp. 2d at 114.

In the complaint, the United States makes a variety of allegations regarding the custody, control, amount, and location of the Swiss bank account at issue. These are all deemed established for the purposes of adjudicating this motion. Additionally, the United States made the following three allegations in the complaint (numbers reference the respective paragraphs in the complaint):

> 14. Monica Toth signed her 2007 federal income tax return under penalty of perjury.
> 15. Monica Toth timely filed her 2007 federal income tax return with the Internal Revenue Service.
> 16. Monica Toth did not report on her 2007 federal income tax return any income or loss from the Account, or otherwise disclose on the return the existence of the Account.

Reporting the account is required on IRS 2007 Form 1040, Schedule B. The instructions on that form read "You must complete this part if you (a) had over $1,500 of taxable interest or ordinary dividends; or (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust." Question 7(a) reads "At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?..." She did not report the account's existence on the corresponding line.

The United States Supreme Court has held that "…where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well…" *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). The First Circuit adopted the *Safeco* definition of "willful" in *Fryer v. A.S.A.P. Fire & Safety Corp.,* 658 F.3d 85, 90-92 (1st Cir. 2011). Prior to *Fryer*, the First Circuit also upheld a similar recklessness standard in *Bank of New England*, when the court found no defects in the trial court's jury instructions on specific intent, stating that "…the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as "a disregard for the governing statute and an indifference to its requirements…Accordingly, we find no error in the court's instruction on willfulness". *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856–57 (1st Cir. 1987).

The Fourth Circuit Court of Appeals concluded that "willful blindness," purposefully avoiding learning facts giving rise to legal liability will not relieve a taxpayer of his duty to comply. *United States v. Williams*, 489 F. App'x 655, 658 (4th Cir. 2012). In *Williams*, the taxpayer filed late FBARs, and the court stated that "[w]illfulness may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information, and it can be inferred from a conscious effort to avoid learning about reporting requirements." *Id.* at 658 (quoting *Sturman*). In *Sturman*, the defendant was alleged to have willfully failed to file FBARs. The court found the evidence sufficient to establish that Sturman knowingly concealed his signature authority, his interests in various transactions, his interest in corporations transferring cash to foreign banks, and that he failed to pursue knowledge of further reporting requirements as suggested on Schedule B of his income tax return. *United States v. Sturman*, 951 F.2d 1466, 1476–77 (6th Cir. 1991).

Applying the allegations contained in the complaint to these legal authorities yields the inescapable conclusion that the relief sought in the complaint may be granted as a matter of law. Accordingly the motion to dismiss must be denied.

d. Rule 12(d) and Ms. Toth's Motion Papers

If a party submits materials outside the pleadings in its motion to dismiss and those materials are accepted by the Court, the motion to dismiss is converted into a motion for summary judgment after notice is given. See Fed. R. Civ. P. 12(d). Ms. Toth submitted over a dozen paragraphs of self-serving and unproven factual allegations comingled with argument in her memorandum of law that does not appear to have any bearing upon the merits of her motion. Ms. Toth also included self-serving exhibits that have not been subjected to cross-examination regarding the hearsay statements contained therein. These exhibits also do not appear to relate to a motion to dismiss. These materials concern Ms. Toth's actions and mental processes after calendar year 2007. For these reasons, the previously-described paragraphs in her memorandum and the exhibits presented are irrelevant to the allegations in the complaint: whether in 2007 she willfully failed to file a FBAR. Because Ms. Toth's materials are irrelevant to whether the United States has sufficiently pled a claim for relief, it is appropriate for the Court exclude them. If the Court does not exclude that material, thereby converting the motion to dismiss into a motion for summary judgment, the United States submits that the present motion is clearly insufficient as to warrant summary judgment in defendant's favor and, thus, should be denied. See Fed. R. Civ. P. 56. Should the Court determine that the converted motion is one that merits consideration by the Court, the United States requests "a reasonable opportunity to present all the material that is pertinent to the motion," after being notified of the need to do so. See Fed. R. Civ. P. 12(d). If such notice is received, the United States will file a declaration pursuant to Rule 56(d) for discovery.

IV. Conclusion

More than one year has passed since the complaint was filed. Ms. Toth evaded service, was defaulted, filed a counterclaim and commenced an action for declaratory judgment. Ms. Toth then fought to set aside the default, and after being given an opportunity by the Court to litigate the merits of the case, Ms. Toth rehashed her previously presented arguments and filed an omnibus motion to dismiss on a wide variety of manifestly incorrect legal theories instead of answering. The Court should deny by text order the motion to dismiss so that this suit may proceed. The Court should also deny Ms. Toth's request for oral argument as her motion is without merit, and nothing Ms. Toth says during that hearing can rectify the manifest deficiencies in her motion.

WHEREFORE, the United States requests that the Court deny the motion filed by Ms. Toth to dismiss the United States' complaint.

Certificate of Service

I hereby certify that a true copy of the above document was served upon the following party by mail on October 27, 2016:

Monica Toth
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/s/Andrew A. De Mello
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